Supreme Court, U.S.
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No. 04-1372

IN THE

Supreme Court of the United States

SETH E. SICROFF,

Petitioner,

v.

STEPHEN C. JETT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Over a period of approximately three years, Petitioner Seth E. Sicroff repeatedly libeled Respondent Stephen C. Jett. At trial, Jett demonstrated that Sicroff made numerous libelous statements; that Sicroff knew that certain of his libelous statements were false when made; and that Sicroff willfully and maliciously injured Jett. Sicroff declined to attend the trial and his counsel offered no evidence to rebut Jett's demonstration. Moreover, the record is barren of any statement by Sicroff or any admissible evidence that Sicroff believed that his libelous statements were true when he made them.

Petitioner presents the following question:

Whether a debt for libel is nondischargeable under section 523(a)(6) of the Bankruptcy Code, which exempts from the discharge debts for "willful and malicious injury," when the debtor believed the libelous statement to be true when it was made.

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PRELIMINARY STATEMENT

Respondent Stephen C. Jett holds a claim for libel against Petitioner Seth E. Sicroff. In the decision below, the Ninth Circuit held that the bankruptcy court had erred in concluding that Jett's claim does not meet the requirements for nondischargeability under section 523(a)(6) of the Bankruptcy Code, 11 U.S.C. § 523(a)(6). Based upon its independent review of the record, the court of appeals determined correctly that the facts demonstrated that Sicroff had "willfully" and "maliciously" injured Jett.

On the question whether the injury to Jett was "willful," the record indicates that Sicroff conceded that Jett had established this statutory requirement. But even if Sicroff had not made this concession, the court of appeals concluded independently that the record demonstrates that Sicroff willfully injured Jett. Pet. App. 10a (describing one example of Sicroff's conduct and stating that "[t]his action demonstrates a specific intent to injure Jett").

On the question whether the injury to Jett was "malicious," the court of appeals concluded that Jett had satisfied this requirement because, among other things, Sicroff intentionally injured Jett "without just cause or excuse." Pet. App. 9a-10a. The court determined properly that, because Sicroff's injury to Jett was both "willful" and "malicious," Sicroff's libel debt was nondischargeable under section 523(a)(6).

The decision of the Ninth Circuit provides no occasion for certiorari review. Contrary to Sicroff's contentions, the decision below is fully consistent with the applicable precedents of this Court. Nor does the Ninth Circuit's decision conflict with the decisions of other courts of appeals in the manner represented by Sicroff. To the extent that some aspects of the Ninth Circuit's decision are inconsistent with aspects of the decisions of other courts of appeals, this case neither requires nor presents the

appropriate vehicle for the Court's intervention, as the result would be the same under the cases that Sicroff cites.

DECISIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reversing the judgment of the district court, is reported at 401 F.3d 1101, and is reproduced at Pet. App. 1a-11a. The opinion of the United States District Court for the Eastern District of California, affirming the judgment of the bankruptcy court, is unreported, and is reproduced at Pet. App. 13a-23a. The opinion of the United States Bankruptcy Court for the Eastern District of California is unreported, and is reproduced at Pet. App. 25a-27a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 23, 2005. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This matter arises out of the chapter 7 bankruptcy case of Petitioner Seth E. Sicroff, a former graduate student at the University of California at Davis ("University"). Respondent, Stephen C. Jett, is a former professor at the University.

After Sicroff filed his bankruptcy case, Jett commenced an adversary proceeding in the bankruptcy court to determine the nondischargeability of Jett's claim against Sicroff for Sicroff's libelous statements made over a period of approximately three years. Prior to the commencement of trial, Jett timely filed and served his pretrial declarations and exhibits, as required by the applicable local rule. He also filed an extensive trial brief setting forth the relevant factual background, pertinent evidence, and law. Sicroff filed nothing and failed to object to Jett's trial evidence, as the local rule requires. As a result of Sicroff's failure to comply with the governing rule, the bankruptcy court granted

Jett's motion *in limine* precluding Sicroff from presenting any evidence at trial. Sicroff (who at the time was apparently living in Nepal) declined to attend the trial and his counsel offered no evidence to rebut Jett's presentation or establish a defense, including any defense that Sicroff believed that his libelous statements were true at the time they were made.[1]

In rendering its decision, the Ninth Circuit conducted an independent review of the record. The court did so, in part, because some of Sicroff's libelous statements "were not evaluated by either the bankruptcy court or the district court for their libelous nature," including Sicroff's allegations in his April 17, 1993 letter that Jett had been "'the subject of numerous . . . charges of unprofessional conduct,' should have been disciplined for 'serious misbehavior,' and had brought a 'continuous barrage of specious complaints' against the department chair." Pet. App. 7a.

In determining that Sicroff's statements constituted libel under California law, the Ninth Circuit expressly noted that "[t]he bankruptcy court determined that statements in the April 17, 1993 letter regarding 'numerous and well-substantiated charges of professional misconduct' were false and Sicroff's counsel did not disagree." Pet. App. 7a. "The record also shows," the Ninth Circuit continued, "that Jett had not been disciplined for 'serious misbehavior' and that he had not brought a 'continuous barrage of specious complaints' against the department chair," as Sicroff stated in the April 17, 1993 letter. *Id.* Thus, the Ninth Circuit found that the record established

[1] In fact, the record demonstrates, among other things, that Sicroff repeated certain of his libelous statements about Jett ***after*** he had been shown that they were false. For example, in August of 1995, Sicroff attended the deposition of Harvey Himelfarb, Acting Vice Provost of the University. *See* Appellant's Excerpts of Record ("AER") filed with the court of appeals, at 222. This deposition demonstrates that certain of Sicroff's libelous statements were untrue. Nevertheless, following the deposition, Sicroff continued to make them, including to a reporter for publication in May of 1996. AER 85-87; 343.

that these statements likewise were false. Pet. App. 7a-8a. The Ninth Circuit also stated that "Sicroff offered no defense of 'privilege' for his statements." *Id.* While Sicroff's petition is expressly premised on — and, indeed, is dependent on — the asserted "fact" that Sicroff believed that his statements were true when he made them, *see, e.g.*, Pet. i, 3, 13, the record submitted to the Ninth Circuit contains ***no*** such statement by Sicroff and ***no*** admissible evidence that Sicroff believed that his statements were true when made. Indeed, as noted, Sicroff provided no defense at all to Jett's evidence demonstrating that Sicroff knew that certain of his libelous statements were false when made.[2]

In determining whether the libel debt at issue in this case was nondischargeable under section 523(a)(6) of the Bankruptcy Code, the Ninth Circuit considered the "willful" and "malicious" elements separately. Pet. App. 8a (citing *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1146 (9th Cir. 2002), and *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1207-09 (9th Cir. 2001)). The Ninth Circuit noted that, in applying the applicable standard,

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[2] In stating that "the evidence tends to show that Sicroff believed those statements to be true," the bankruptcy court cited a letter from Sicroff to the editor of the California Aggie. Pet. App. 26a-27a. In that letter, Sicroff refers to documents that, according to the letter, proved Sicroff's libelous statements to be "facts." However, the Acting Vice Provost of the University testified at a deposition attended by Sicroff that, had Jett been the subject of "numerous and well-substantiated charges of professional misconduct" or been disciplined for "serious misbehavior," as Sicroff claimed, Jett's personnel file would have contained documents reflecting such charges and disciplinary action, but that Jett's file contained no such documents. In addition, the letter is pure hearsay; none of the alleged documents referred to in the letter were ever produced; and Sicroff did not testify concerning any aspect of the alleged truth of his assertions or the statements in the letter, or that he actually believed any particular statement to be true. Accordingly, as noted, the record is devoid of any statement by Sicroff or any admissible evidence that Sicroff believed the truth of any of his libelous statements at the time that he made them.

the court may consider "circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action" as well as "what a debtor may admit to knowing." Pet. App. 8a (quoting *In re Su*, 290 F.3d at 1146 n.6) (internal quotation marks omitted).

As to the "willfulness" element, the court noted that Sicroff had "explicitly conceded" that his conduct was "willful and intentional" for purposes of determining nondischargeability, and that he had "offered no evidence that could counterbalance the weight of his concession." Pet. App. 8a. Indeed, the record indicates that Sicroff conceded, not only that his ***conduct*** was willful, but that Jett had satisfied the "willful injury" ***element*** of section 523(a)(6), leaving only the question whether the injury also was malicious.[3] Accordingly, the Ninth Circuit concluded correctly that, because of Sicroff's concessions, "we do not need to apply the analysis set out in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), in which the Supreme Court addressed the question of when an injury is 'willful.'" *Jett v. Sicroff (In re Sicroff)*, 401 F.3d 1101, 1106 n.4 (9th Cir. 2005).[4]

Sicroff insists in his petition that he conceded only that his libelous conduct was intentional; not that he intended to injure Jett. *See* Pet. 3, 6, 7, 15. As noted, however, the record indicates

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[3] For example, Sicroff's counsel stated at trial that his "position is it's not the level of maliciousness to avoid dischargeability." AER 470. Counsel stated further: "The whole point here is that we know this is willful, the question is: is it malicious? . . . If it's not malicious, then the debt is discharged . . . . [W]hat really happened here was not malicious." AER 474. Counsel also stated: "I guess my point in coming here and saying: 'Accept all his facts; I don't think that you've raised to that level of malicious.'" AER 477; *see also* Pet. App. 8a (noting that "Sicroff explicitly conceded that his behavior was 'willful and intentional' for purposes of the dischargeability hearing").

[4] The Court should be aware that the footnote in the Ninth Circuit's decision containing this statement was inadvertently omitted from the reprinted version of the decision that appears in Petitioner's Appendix. For this reason, the published opinion is cited here.

otherwise. In any event, even if Sicroff had not made any concessions, the Ninth Circuit also concluded, based on its own review of the record, that the evidence clearly demonstrated Sicroff's "intent to injure Jett." Pet. App. 10a. Accordingly, the Ninth Circuit's analysis includes, not only a discussion of the willful nature of Sicroff's conduct, but also the willful nature of the resulting injury.

As for "maliciousness," the Ninth Circuit, based on its review of the record, stated as follows:

> In the case before us, we similarly must conclude that Sicroff's goal of protesting the Geography Department's closure did not provide just cause or excuse to calumniate Jett's professional reputation. Not only were his libelous statements legally wrongful, but Sicroff went well beyond the scope of his legitimate goal to attack Jett by name. When the California Aggie first printed his letter on April 22, 1993, it prudently excised the personalized attacks against Jett and Bahre. In response to this edit, Sicroff sent a second letter, which the newspaper reprinted on April 26, 1993, complaining that "[t]he edited version of my letter that you printed April 22 about the geography department . . . did not at all represent the main point of the letter" and inviting "readers [who] would like the full text of the letter [to] please drop me a note at the geography department." This action demonstrates a specific intent to injure Jett over and above otherwise legitimate protest. For these reasons, the bankruptcy court erred in its interpretation of the phrase "just cause and excuse" and in its conclusion that Sicroff's defamation was not malicious by virtue of its connection to a larger, legitimate purpose. We hold

> instead that Sicroff's libelous statements were not made with just cause and excuse and that, as a result, they were malicious.

Pet. App. 10a (footnote omitted).

REASONS FOR DENYING THE PETITION

Sicroff contests the Ninth Circuit's conclusion that his libel obligation constitutes a debt "for willful and malicious injury" under section 523(a)(6) of the Bankruptcy Code. In support of his argument, Sicroff relies heavily on his assertions that (i) the bankruptcy court made a "factual finding — undisturbed on appeal — that the debtor believed his statements to be true when he published them" and (ii) "California law requires no more than a finding of negligence as to truth or falsity to support a libel verdict and none of the lower courts found (or suggested that the record would support a finding) that the Petitioner was more than negligent in believing his statements to be true." Pet. 3. Sicroff contends that the decision below therefore "conflicts with and undermines" this Court's decision in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), and also conflicts with the decision of the Fifth Circuit in *Miller v. J.D. Abrams Inc. (In re Miller)*, 156 F.3d 598, 606 (5th Cir. 1998), and with the decisions of the Sixth Circuit in *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986), and *Kennedy v. Mustaine (In re Kennedy)*, 249 576, 581, 582-83 (6th Cir. 2001). Pet. 8.

These assertions are unsound. First, the record contains no statement by Sicroff and no admissible evidence that Sicroff actually believed that his libelous statements were true when he made them. Indeed, the record contains contrary evidence; i.e., that Sicroff must have known that at least some of his libelous statements were false at the time of their making and that Sicroff continued to make libelous statements even after the falsity of these statements was confirmed by the University. Accordingly, Sicroff's case does not fit within the scope of the question that he has presented for review — "[w]hether a debt

for libel is nondischargeable under Section 523(a)(6) of the Bankruptcy Code, which exempts from the discharge debts for 'willful and malicious injury,' ***when the debtor believed the libelous statement to be true when it was made.***" Pet. i (emphasis supplied).

Second, regardless of whether California law permits a judgment for libel based on no more than a finding of mere negligence, the record demonstrates that Sicroff (i) made numerous libelous statements against Jett; (ii) had to have known that at least some of his libelous statements were false when he made them; (iii) continued to libel Jett after his libelous statements were shown to be false; (iv) made the libelous statements with the specific intent to injure Jett; (v) conceded that he had acted "willfully" for purposes of determining the dischargeability of his debt to Jett under section 523(a)(6); and (vi) intentionally injured Jett without just cause or excuse. The Ninth Circuit properly concluded that Sicroff's conduct satisfied the "willful" and "malicious" injury elements of the statute. Accordingly, the Ninth Circuit correctly determined that the libel debt at issue was nondischargeable under section 523(a)(6).

The decision of the Ninth Circuit is consistent with this Court's decision in *Geiger* and with the decision of the Fifth Circuit in *Miller* and the decisions of the Sixth Circuit in *Wheeler* and *Kennedy*. To the extent that some aspect of the Ninth Circuit's analysis diverges from aspects of decisions from the Fifth and Sixth Circuits, this case nevertheless neither requires nor presents the appropriate vehicle for the Court's intervention, as there is no basis from which to conclude that the result would be any different under these other decisions. Indeed, review of these other decisions demonstrates that the outcome would be the same.

A. The Writ Should Be Denied Because The Decision Below Comports With Applicable Supreme Court Precedent.

1. The applicable Supreme Court precedent

Sicroff claims that the Ninth Circuit's analysis "was premised on a misguided, and unduly narrow, interpretation of this Court's decision in *Geiger*"; failed to acknowledge that "*Geiger* made quite clear that an injury is 'willful and malicious' only if the debtor intended to cause legal injury, and not if the debtor acted negligently or even recklessly"; and "implausibly read *Geiger* to leave intact much of the Ninth Circuit's pre-*Geiger* caselaw, under which conduct was 'malicious' if it lacked 'just cause and excuse,' and no intent to injure was required." Pet. 3. It is Sicroff's analysis, however, that is in error, as the decision below is fully consistent with *Geiger*.

a. The *Tinker* case

Tinker v. Colwell, 193 U.S. 473 (1904), discussed by the Court in *Geiger*, was the first case to address the "willful and malicious" injury exception to the bankruptcy discharge, as set forth in the Bankruptcy Act of 1898. In *Tinker*, respondent Colwell had obtained a state-court judgment against Tinker for "criminal conversation" with Colwell's wife. 193 U.S. at 480. The Court held that Tinker's debt involved a "willful and malicious" injury to Colwell and, therefore, the debt was nondischargeable, even if Tinker's actions were motivated by his passion for Mrs. Colwell, rather than "personal malevolence" or "special malice" toward Mr. Colwell. 193 U.S. at 485.

The Court held that the "willful" element of the exception was satisfied because Tinker committed the act voluntarily and intentionally and that the "malicious" element was satisfied by proof that Tinker had committed a wrongful act, done intentionally, and without just cause or excuse. 193 U.S. at 485-86.

When the Bankruptcy Code was revised in 1978, the "willful and malicious" injury exception to the discharge remained. In reenacting what is now section 523(a)(6), the United States Senate and the United States House of Representatives each stated that they intended the word "willful" to mean "deliberate or intentional," and that to "the extent that *Tinker v. Colwell* . . . held" that a 'less strict' (Senate), or 'looser' (House)," standard is intended . . . [it is] overruled." *See Geiger v. Kawaauhau (In re Geiger)*, 113 F.3d 848, 850-51 (8th Cir. 1997) (en banc) (quoting S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, and H.R. Rep. No. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963). Both houses of Congress also stated that they intended to overturn any cases that had applied "a 'reckless disregard' standard" in deciding whether debts were not dischargeable." *Id.*

b. The *Geiger* case

In the *Geiger* case, the creditors alleged that debtor Geiger could not discharge a medical malpractice debt because the malpractice judgment gave rise to a debt for "willful and malicious" injury under section 523(a)(6) of the Bankruptcy Code. *Kawaauhau v. Geiger (In re Geiger)*, 172 B.R. 916, 920 (E.D. Mo. 1994). The bankruptcy court agreed, holding that Geiger's treatment was so far below the standard level of care that it could be categorized as "willful and malicious" conduct. 172 B.R. at 923. On appeal, the district court affirmed, based on Geiger's admission that he knew that he was providing substandard care. *Geiger v. Kawaauhau (In re Geiger)*, 113 F.3d 848, 850-51 (8th Cir. 1997). According to the district court, this admission rendered Geiger's conduct "willful," and "the fact that Geiger's conduct 'was certain or substantially certain to cause physical harm' rendered it malicious within the meaning of" section 523(a)(6). *Id.*

On rehearing en banc, the Eighth Circuit reversed, concluding that the standard to be applied in determining whether Geiger's conduct was "willful" was whether Geiger

intended to cause the consequences of his act or at least believed that the substandard care would result in the consequence that occurred — amputation of the patient's leg. 113 F.3d at 854. The Eighth Circuit held that Geiger's conduct was not willful because there was no evidence to suggest that Geiger intended that the patient suffer serious consequences. 113 F.3d at 852. At most, the debt was attributable to negligent or reckless conduct, not to an intentional tort. *Id.* at 853. Based upon the foregoing analysis, the Eighth Circuit held that the debt was dischargeable. *Id.* at 853-54. Significantly, the Eighth Circuit expressly acknowledged that section 523(a)(6) requires that the injury at issue be ***both*** "willful" and "malicious" and explicitly limited the scope of its holding to the determination of what must be shown to establish "willfulness" under the statute:

> Finally, we observe that in this case we hold only that for a judgment debt to be nondischargeable under the relevant statutory provision, it is necessary that it be based on the commission of an intentional tort. We believe, as we have said, that the debtor's conduct cannot otherwise be said to be "willful." We express no view, however, on the question of whether it is sufficient for nondischargeability that the judgment be for an intentional tort. We note in this connection that 11 U.S.C. § 523(a)(6) requires that the injury be both "willful and malicious" before an entitlement to the exception to discharge arises. . . . Since it is not necessary to a decision in this case that we decide the meaning of the word "malicious" and the bearing, if any, that the interpretation given to that word might have on the dischargeability of a judgment debt, we have no occasion to discuss the matter, and thus we venture no opinion on it.

113 F.3d at 852-53.

This Court framed the question presented in *Geiger* as follows: Does § 523(a)(6)'s compass cover acts, done intentionally, that cause injury . . . , or only acts done with the actual intent to cause injury . . . ?" 523 U.S. at 61. Like the Eighth Circuit, this Court answered the question by focusing its analysis on the term "willful." The Court reasoned:

> The word "willful" in [section 523](a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected an additional word or words, i.e., "reckless" or "negligent," to modify "injury."

523 U.S. at 61. The Court went on to hold that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." 523 U.S. at 64. In so doing, the Court rejected the petitioners' "more encompassing interpretation [that] could place within the excepted category a wide range of situations in which an act is intentional, but injury is unintended, i.e., neither desired nor in fact anticipated by the debtor." 523 U.S. at 61.

In the course of its decision, this Court rejected the petitioners' reliance on certain statements in the *Tinker v. Colwell* decision in support of their argument that acts done intentionally that cause unintended injury satisfy the "willful" element of section 523(a)(6). The Court explained: "*Tinker* thus placed criminal conversation solidly within the traditional intentional tort category, and we so confine its holding. That decision, we clarify, provides no warrant for departure from the current statutory instruction that, to be nondischargeable, the judgment

debt must be 'for willful and malicious injury.'" 523 U.S. at 62-63.[5]

2. The decision below is fully consistent with Supreme Court precedent.

The petition assumes that the Ninth Circuit committed legal error by separately considering the "willful" and "malicious" elements of section 523(a)(6). Pet. 3. This assumption is baseless.

As a threshold matter, it should be noted that this Court denied certiorari review in *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202 (9th Cir.), *cert. denied*, 533 U.S. 930 (2001), one of the post-*Geiger* cases cited by the Ninth Circuit in stating that the two elements are analyzed separately.

Moreover, as noted, the Eighth Circuit acknowledged in its decision in *Geiger* that section 523(a)(6) requires that the injury at issue be both "willful" and "malicious" and limited the scope of its holding to the determination of what must be shown to establish "willfulness" under the statute. 113 F.3d at 852-53. Accordingly, the issue before this Court in the *Geiger* case was whether the Eighth Circuit's interpretation of the "willful" element was correct. There is no basis to conclude from the fact that the Court focused only on the "willful" element in its analysis that *Geiger* established, *sub silentio*, a new "unitary" standard for determining nondischargeability under section 523(a)(6). After all, given that the statute, by its terms, requires both "willfulness" and "maliciousness," the Court's conclusion in *Geiger* that "willfulness" had not been established was dispositive of the question whether the debt at issue was nondischargeable and there simply was no reason for the Court to consider the "malicious" element. *See Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th Cir. 1999) ("From

[5] Defamation is generally regarded as an intentional tort. *See Farmers Educ. & Co-op. Union of Am., ND Div. v. WDAY, Inc.*, 360 U.S. 525, 542 (1959).

the plain language of the statute, the judgment must be for an injury that is both willful and malicious. The absence of one creates a dischargeable debt.").

Nor does anything in the *Geiger* decision require or mandate that the two terms employed by Congress in section 523(a)(6) — "willful" and "malicious" — be conflated or that courts are no longer to consider the "malicious" element in determining nondischargeability under this provision. Indeed, for the Court to have so construed section 523(a)(6) would contravene a settled canon of statutory construction that was discussed in *Geiger* itself — i.e., that "'we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.'" 523 U.S. at 62 (quoting *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988)). *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) ("[W]e construe statutes, where possible, so as to avoid rendering superfluous any parts thereof."); *see also In re Markowitz*, 190 F.3d at 463 ("From the plain language of the statute, the judgment must be for an injury that is both willful and malicious. The absence of one creates a dischargeable debt."); 4 ALAN N. RESNICK, ET AL., COLLIER ON BANKRUPTCY ¶ 523.12[2], 523-90 (15th ed. 2004) ("The requirements of 'willfulness' and 'maliciousness' are distinct requirements in the statutory text and are usually treated as such by the courts.").

Furthermore, nothing in the *Geiger* decision precludes courts from conducting an analysis of section 523(a)(6) that considers the "willful" element and the "malicious" element separately, as long as the rule of *Geiger* is not violated in the process — i.e., as long as debts for unintentional injuries are not held to be nondischargeable under section 523(a)(6). 523 U.S. at 64. Indeed, although this Court, in *Geiger*, rejected *Tinker* to the extent that it suggests that acts done intentionally that cause unintended injury are "willful and malicious" for purposes of section 523(a)(6), *see Geiger*, 523 U.S. at 62-63,

the Court did not abrogate *Tinker*'s statement of the "malicious" element of section 523(a)(6) as "a wrongful act, done intentionally, without just cause or excuse," *see Tinker*, 193 U.S. at 485-86. Thus, if a court concludes in its determination of nondischargeability under section 523(a)(6), as the Ninth Circuit did in the decision below, that a debtor intended to cause injury to the creditor, there is no conflict with *Geiger*, notwithstanding that the minimum requirements of the legal standard applicable to determining liability for the underlying claim may be negligence or recklessness.

The decision below does not violate the rule of *Geiger*. As to the "willful" element, the Ninth Circuit found that Sicroff had explicitly conceded that his behavior was "willful and intentional" and had "offered no evidence that could counterbalance the weight of his concession." Pet. App. 8a. As noted, the record indicates that Sicroff conceded that the "willful" element of the section 523(a)(6) inquiry had been established for purposes of determining nondischargeability. *See* footnote 3, *supra*. Given this concession — essentially, a stipulation — the Ninth Circuit properly concluded that it was not necessary to apply the Court's analysis in *Geiger*, which focused on the requirements for establishing the "willful" element of section 523(a)(6). *See Jett*, 401 F.3d at 1106 n.4. Surely, this Court need not intervene in this case in order to save Sicroff from the consequences of his own admission. More importantly, it does not follow from the Ninth Circuit's acceptance of Sicroff's concession as establishing the "willful" element of section 523(a)(6) that the decision below contravenes the rule of *Geiger*.

Sicroff makes much of the claimed "fact" that he believed his statements to be true when he published them and his assertion that "California law requires no more than a finding of negligence as to truth or falsity to support a libel verdict and none of the lower courts found (or suggested that the record would support a finding) that the Petitioner was more than

negligent in believing his statements to be true." *See* Pet. 3, 13. Neither of these contentions supports the petition's argument that the Ninth Circuit's decision "conflicts with and undermines" *Geiger*.

First, although the decision below did not specifically mention the bankruptcy court's statement that "the evidence tends to show that [Sicroff] believed those statements to be true," Pet. App. 26a-27a, the Ninth Circuit determined that the bankruptcy court had clearly erred in concluding that the facts fell short of proving that Sicroff's acts were either willful or malicious. Pet. App 8a. Moreover, the record submitted to the Ninth Circuit contains no statement by Sicroff and no admissible evidence that Sicroff believed that his statements were true when he made them. Indeed, as noted, the record contains evidence that Sicroff must have known that at least some of his libelous statements were false at the time he made them and that Sicroff continued to libel Jett even after the University confirmed the falsity of his statements.

Furthermore, as discussed above, the Ninth Circuit expressly noted that courts may consider "circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action as well as "what a debtor may admit to knowing." Pet. App. 8a (quoting *In re Su*, 290 F.3d at 1146 n.6) (internal quotation marks omitted). The Ninth Circuit observed from its independent review of the record that "[t]he bankruptcy court determined that statements in the April 17, 1993 letter regarding 'numerous and well-substantiated charges of professional misconduct' were false and Sicroff's counsel did not disagree," and that "[t]he record also shows that Jett had not been disciplined for 'serious misbehavior' and that he had not brought a 'continuous barrage of specious complaints' against the department chair," as Sicroff stated in the April 17, 1993 letter. Pet. App. 7a.

Sicroff is simply wrong in suggesting that the minimum requirements of California law with respect to proving libel

claims is dispositive of the entirely distinct question whether the Ninth Circuit erred in determining, on the record before it, that the debt at issue was nondischargeable under section 523(a)(6) of the Bankruptcy Code. *See Mills v. Ellerbee (In re Ellerbee)*, 177 B.R. 731, 742 (Bankr. N.D. Ga. 1995) ("Whether the statements were true or false, Ellerbee knew that their publication would necessarily lead to injury. Reckless though he may have been about the truth, he was deliberate about causing injury. Therefore, because he acted intentionally to inflict harm on Mills, Ellerbee acted willfully for purposes of section 523(a)(6). The Debtor offered no evidence to the contrary."), *aff'd sub nom. Ellerbee v. Mills*, 78 F.3d 600 (11th Cir.) (table), *cert. denied*, 519 U.S. 947 (1996).

Contrary to Petitioner's argument, the decision below did ***not*** hold that an injury inflicted negligently or recklessly is nondischargeable under section 523(a)(6); nor did it hold that the section 523(a)(6) exception requires no intent to injure. Rather, the Ninth Circuit properly accepted Sicroff's concession regarding the willfulness requirement and went on to conclude that Sicroff's conduct also was "malicious" for purposes of section 523(a)(6), based, in part, upon its independent determinations that "Sicroff went well beyond the scope of his legitimate goal to attack Jett by name," and that Sicroff's actions "demonstrate[d] a specific intent to injure Jett over and above otherwise legitimate protest." Pet. App. 10a. That the Ninth Circuit made its determination of specific intent to injure in the context of its analysis of the "malicious" element, rather than the "willful" element, provides no basis for certiorari review.

B. The Writ Should Be Denied Because The Decision Below Does Not Conflict With Decisions Of The Fifth And Sixth Circuits, And To The Extent That There Is Any Disagreement, This Case Neither Requires Nor Presents The Appropriate Vehicle For The Court's Intervention As The Result Would Be The Same Under The Cases Cited By Petitioner.

Sicroff contends that

> [t]he Ninth Circuit's construction of the 'malicious injury' requirement, under which an injury may be malicious even if the debtor was merely negligent and had no intent to cause legally cognizable injury, presents a square conflict with the Fifth Circuit's holding that to satisfy the 'malicious' requirement, legally cognizable injury must have actually been intended by the debtor or so certain to result that the injury is deemed intentional.

Pet. 8-9 (citing *Miller*, 156 F.3d at 606). He contends further that the decision below conflicts with the decisions of the Sixth Circuit in *Wheeler*, 783 F.2d at 615, and *Kennedy*, 249 F.3d at 581, 582-83, based upon the assertion that these decisions require that a debt for libel cannot be excepted from the discharge under section 523(a)(6) unless the debtor was aware that the defamatory statements were false when the statements were made. Pet. 8, 11-14. Neither of these asserted "conflicts" warrants certiorari review of this case.

1. The decision below does not conflict with the Fifth Circuit's decision in *Miller* in the manner represented by Petitioner and the result in the decision below would have been the same under *Miller* in any event.

As noted, the Ninth Circuit cited its post-*Geiger* decision in *In re Jercich* in stating that the "willful" and "malicious"

elements of section 523(a)(6) are to be analyzed separately. Pet. App. 8a (citing *In re Jercich*, 238 F.3d at 1207-09). The Ninth Circuit also cited *In re Jercich* in stating its test for determining whether the "malicious" element has been established, as follows: "An injury is 'malicious,' as that term is used in Section 523(a)(6), when it is: '(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.'" Pet. App. 8a (quoting *In re Jercich*, 238 F.3d at 1209). Although the petition does not explicitly claim error requiring certiorari review with respect to the Ninth Circuit's separate analysis of the two elements of section 523(a)(6), it does contend that the Ninth Circuit's test for the "malicious" element conflicts with the Fifth Circuit's decision in *Miller*, 156 F.3d at 606. To the extent that there is any conflict between the decision below and the *Miller* decision, it does not warrant certiorari review of the instant case.

In *Miller*, the Fifth Circuit concluded that *Geiger* mandates that the "willful and malicious injury" exception to the discharge is a "unitary concept" and held that "an injury is 'willful and malicious' where there is either an objective substantial certainty of harm or subjective motive to cause harm." 156 F.3d at 603, 606.

It is true that, in contrast to the Fifth Circuit, the Ninth Circuit, among other courts — e.g., the Sixth Circuit, *see In re Markowitz*, 190 F.3d at 463 — continues to analyze the "willful" and "malicious" elements of section 523(a)(6) separately. But there is no basis to conclude from this difference that an actual conflict exists or that the decision below is an appropriate vehicle for certiorari review. As discussed in detail above, and as courts have correctly recognized in post-*Geiger* decisions, separate analysis of the two elements of section 523(a)(6) is fully consonant with both the plain language of the statute and the *Geiger* decision itself, which addressed only the element of "willfulness."

The discussion in the prior section also makes clear that application of the test applied by the Fifth Circuit in the *Miller* case — whether there is either an objective substantial certainty of harm or subjective motive to cause harm — to the record submitted to the Ninth Circuit in this case would ***not*** have changed the result, given that the Ninth Circuit expressly found that the bankruptcy court had clearly erred in concluding that the facts fell short of proving that Sicroff's acts were either willful or malicious under section 523(a)(6), *see* Pet. App. 8a, and that Sicroff specifically intended to injure Jett, *see* Pet. App. 10a. Again, the minimum requirements of California law with respect to proving libel claims is ***not*** dispositive of the distinct question whether "maliciousness" (or "willfulness," for that matter) has been established for purposes of determining nondischargebility under section 523(a)(6) of the Bankruptcy Code. Moreover, contrary to Sicroff's contention, the decision below held neither that an injury inflicted negligently or recklessly is nondischargeable under section 523(a)(6) nor that the section 523(a)(6) exception requires no intent to injure.

2. Certiorari review of the decision below is not warranted based upon the asserted conflict with the decisions of the Sixth Circuit in *Wheeler* and *Kennedy*.

Sicroff contends that the decision below "is in direct conflict with the Sixth Circuit's decision in *Wheeler v. Laudani*, 783 F.2d 610 (6th Cir. 1986), which held that a defamatory statement is "willful and malicious injury" under § 523(a)(6) only if the debtor knew the statement was false when it was made" and is "also at odds with the Sixth Circuit's decision in *Kennedy v. Mustaine (In re Kennedy)*, 249 F.3d 576 (6th Cir. 2001), which held that a libel debt was nondischargeable precisely because the debtors continued to make their statements even after receiving clear proof that the statements were false." Pet. 4. *See* Pet. 11-13. Again, to the extent that there is any conflict, there is no basis for certiorari review of the decision below.

a. The *Wheeler* case

The issue before the Sixth Circuit in the (pre-*Geiger*) *Wheeler* case was whether the bankruptcy court correctly entered summary judgment in favor of the creditors in their adversary proceeding to determine whether a state-court libel judgment against the debtor, which was based upon a jury verdict, was nondischargeable under section 523(a)(6). Applying a pre-*Geiger* test for nondischargeability — "a wrongful act done intentionally which necessarily produces harm and is without just cause or excuse" — the bankruptcy court concluded that the jury verdict, which found the debtor liable for defamation in a public-figure case, encompassed within it a finding that the debtor had willfully and maliciously injured the creditors and, therefore, that the debt based upon the libel judgment was nondischargeable. 783 F.2d at 614. According to the bankruptcy court, there was no disparity between the standard considered by the jury in determining liability for defamation and the test for determining "willful and malicious conduct" for purposes of section 523(a)(6). *Id.*

In the course of its analysis, the Sixth Circuit stated that the "malicious" element of section 523(a)(6) "does not require ill-will or specific intent to do harm"; that "[t]he intentional tort of libel meets the requirements of § 523(a)(6) for non-dischargeability when the debtor/author knows the published statements were false"; and that "[m]ere reckless disregard for the truth or falsity of the statement, which can support a libel verdict, is not a willful and malicious injury for purposes of § 523(a)(6)." 783 F.2d at 615 (citations omitted). The Sixth Circuit concluded that "the case was not in proper posture for summary judgment" because the record before it did not reveal whether the jury's verdict rested on a finding that the debtor had acted recklessly or whether he had acted knowingly. *Id.*

Several points are clear. First, Sicroff's representation that the Sixth Circuit concluded in *Wheeler* that the debt at issue in that case "was not for 'willful and malicious injury' and was

dischargeable," *see* Pet. 12, is demonstrably in error. The *Wheeler* decision concludes simply that "genuine issues of material fact exist which render this case in its current posture inappropriate for summary judgment." 783 F.2d at 615. Based upon this conclusion, the court remanded the case, directing the bankruptcy court to review the trial transcripts in the underlying libel case and determine what findings were encompassed within the jury verdict and judgment. *Id.* at 15-16.

Second, Sicroff's representation that *Wheeler* "held that a defamatory statement is 'willful and malicious injury' under § 523(a)(6) only if the debtor knew the statement was false when it was made," *see* Pet. 4, also is inaccurate. *See also* Pet. 11 (erroneously asserting that the *Wheeler* and *Kennedy* decisions "provide that in order for a claim for libel to be a debt for 'willful and malicious injury' the debtor must have been aware that the statements in question were false when he made them"). The Sixth Circuit did not so hold and its statement that "[t]he intentional tort of libel meets the requirements of § 523(a)(6) for non-dischargeability when the debtor/author knows the published statements were false," 783 F.2d at 615, is wholly insufficient to bear the weight of Sicroff's contention. It is simply wrong as a matter of law and logic to equate a statement concerning a circumstance that satisfies the requirements of section 523(a)(6) with a holding that the requirements of section 523(a)(6) are met ***only*** when such a circumstance is present. Equally erroneous is the petition's central assumption that the minimum legal requirements for proving libel claims is dispositive of the distinct question whether "maliciousness" (or "willfulness") has been established for purposes of determining nondischargebility under section 523(a)(6) of the Bankruptcy Code.

Furthermore, and as also discussed above, although the decision below did not specifically mention the bankruptcy court's statement that "the evidence tends to show that [Sicroff]

believed those statements to be true," Pet. App. 26a-27a, the Ninth Circuit determined nonetheless that the bankruptcy court had clearly erred in concluding that the facts fell short of proving that Sicroff's acts were either willful or malicious. Pet. App 8a. And, again, the record submitted to the Ninth Circuit contains no statement by Sicroff and no admissible evidence that Sicroff believed that his statements were true when he made them. On the other hand, the record does contain evidence that Sicroff must have known that at least some of his libelous statements were false at the time he made them and that Sicroff continued to libel Jett even after the University confirmed the falsity of his statements.

Finally, the decision below did ***not*** hold that section 523(a)(6) requires no intent to injure or that an injury inflicted negligently or recklessly is nondischargeable under section 523(a)(6), as the petition claims. To the contrary, the Ninth Circuit properly accepted Sicroff's concession that his conduct was "willful" for purposes of determining nondischargeability as establishing this element and separately concluded that Sicroff's conduct also was "malicious" for purposes of section 523(a)(6), based, in part, upon its independent determinations that "Sicroff went well beyond the scope of his legitimate goal to attack Jett by name," and that Sicroff's actions "demonstrate[d] a specific intent to injure Jett over and above otherwise legitimate protest." Pet. 10a.

b. The *Kennedy* case

Nor does the Sixth Circuit's decision in the *Kennedy* case provide a basis for concluding that certiorari review of the decision below is warranted.

As an initial matter, it is important to note that the petition inaccurately represents that the *Kennedy* decision (and the *Miller* decision) "provide that in order for a claim for libel to be a debt for 'willful and malicious injury' the debtor must have been aware that the statements in question were false when he made

them," Pet. 11, and that "*Kennedy* only strengthened and reaffirmed *Wheeler*'s ultimate holding that a libelous statement could not constitute 'willful and malicious injury' if the debtor believed the statement to be true when made," Pet. 12 n.6. Sicroff's error regarding the claimed "ultimate holding" in *Wheeler* is discussed above. As for the *Kennedy* decision, it mentions *Wheeler* only once — in the context of stating that the case had been overruled by *Geiger*.[6] *See Kennedy*, 249 F.3d at 580. Nowhere does the *Kennedy* decision state anything that bears resemblance to the proposition that, "in order for a claim for libel to be a debt for 'willful and malicious injury' the debtor must have been aware that the statements in question were false when he made them," as the petition asserts. Pet. 11.

In *Kennedy*, the Sixth Circuit determined that a debt for libel was nondischargeable under section 523(a)(6), based upon prior state-court judgments that established the elements of the creditors' defamation claim and the application of its post-*Geiger* decision in *In re Markowitz*, in which the Sixth Circuit interpreted *Geiger* to require that, "unless the actor desires to cause [the] consequences of his act, or . . . believes that the consequences are substantially certain to result from it, he has not committed a 'willful and malicious injury' as defined under § 523(a)(6)." *Markowitz*, 190 F.3d at 464 (internal quotation marks and citation omitted). In reaching its conclusion that the lower courts were correct in determining that the claim at issue was nondischargeable under section 523(a)(6), the *Kennedy* Court explained:

In rendering its decision, the bankruptcy court opined as follows:

> In summation, this Court finds that the facts necessary to support a determination of nondischargeability under § 523(a)(6) of the

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[6] Sicroff discusses the import of *Geiger*'s overruling of *Wheeler* in footnote 6 of the petition. *See* Pet. 12.

> Plaintiffs' defamation claim are clearly established by the prior Kentucky and Michigan judgments. First, the Michigan judgment establishes that the statements at issue were in fact made, while the Kentucky judgment establishes that they were defamatory in character and intentional in nature. Second, the Kentucky judgment establishes that the statements were inherently injurious, giving rise to an inference of an expectation of harm and intent to injure. Lastly, the Michigan judgment expressly established that the statements were made without just cause or excuse.

In finding that the bankruptcy court did not err in rendering this decision, the district court stated:

> Appellants argue that the trial court [bankruptcy court] denied full faith and credit to the Michigan judgment by imputing the more stringent "intentional" standard used in Kentucky when the Michigan court had not found "intent." Appellants argue that the Bankruptcy Court was only able to impute "intent" by looking at the Kentucky judgment. However, it is not merely Kentucky law, but Michigan law as well, that words imputing lack of chastity are defamatory *per se*, i.e., injurious by their nature.[7] Furthermore, the Michigan judgment found that the Kennedys made their injurious statements even after they knew that DNA tests had conclusively established the falsity of the injurious

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[7] Respondent argued below that the statements at issue in this case constitute libel *per se* under California law. *See* Cal. Civ. Code § 45 ("Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."). California law is similar to Michigan law on this point.

statements. Thus, even without reference to the Kentucky judgment, it is apparent that the debt is nondischargeable, consistent with *Kawaauhau*. . . .

Under Michigan law, words as to a lack of chastity are defamation *per se* — i.e., injurious by their nature; it therefore was unnecessary for the bankruptcy court to consider the Kentucky judgment in order to find that Debtors were estopped from litigating whether these defamatory statements were intentional and substantially certain to cause harm for purposes of § 523(a)(6).

The court noted that when the words at issue [are defamatory *per se*], "injury to the reputation of the person is presumed. . . ." Accordingly, as found by the district court, under Michigan law it is presumed that when Debtors made statements as to Creditors' chastity in the case at hand, they were substantially certain that harm would result because such statements are considered defamation *per se*. In addition, the Michigan court also made reference to the fact that Debtors made these statements intentionally inasmuch as Debtors continued to make the statements to third parties even after they became aware of the results of the DNA paternity tests which excluded Wilbur as Debtor Diane Kennedy's father.

Therefore, even if an argument could be made that the bankruptcy court should not have considered both the Michigan as well as the Kentucky state court judgments, as the district court properly concluded, the outcome does not change inasmuch as the Michigan judgment in and of itself precludes litigation of this issue because the statements at issue are defamation *per se* under Michigan law, meaning that the courts presume that the speakers make such statements knowing that substantial harm or injury

> will result. *See Markowitz*, 190 F.3d at 464 (holding that "unless 'the actor desires to cause consequences of his act, or . . . believes that the consequences are substantially certain to result from it,' he has not committed a 'willful and malicious injury' as defined under § 523(a)(6)").

Kennedy, 249 F.3d at 581-83 (citations omitted).

The decision below is fully consistent with the *Kennedy* decision. As has been shown, the Ninth Circuit determined that the bankruptcy court had clearly erred in concluding that the facts fell short of proving that Sicroff's acts were either willful or malicious, Pet. App 8a, and the record submitted to the Ninth Circuit contains no statement by Sicroff and no admissible evidence that Sicroff believed that his statements were true when he made them.

Sicroff finds it significant that the debtor in *Kennedy* "continued to make the statements in question even after receiving clear proof that the statements were false; . . . thus, it is clear that in making the statements, the [debtors] intended injury." Pet. 12-13. This factor, however, serves only to demonstrate that the decision below is entirely consistent with *Kennedy*: As noted, the record contains evidence that Sicroff must have known that at least some of his libelous statements were false at the time he made them and that he continued to libel Jett even after the University confirmed the falsity of his statements. Furthermore, the Ninth Circuit expressly determined, based upon its own review of the record before it, that "Sicroff went well beyond the scope of his legitimate goal to attack Jett by name," and that Sicroff's actions "demonstrate[d] a specific intent to injure Jett over and above otherwise legitimate protest." Pet. 10a.

CONCLUSION

The record is barren of any statement by Sicroff or any admissible evidence that Sicroff believed that his libelous statements were true when made. Accordingly, the facts of this case place it outside the scope of the question that Sicroff has presented for review. In addition, the decision of the Ninth Circuit correctly applies section 523(a)(6) of the Bankruptcy Code in a manner consistent with the applicable precedents of this Court and the decisions of other courts of appeals. Furthermore, the outcome would be the same under the decisions of other courts of appeals cited by Sicroff. For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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